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MATERIALS ON CONFLICT OF LAWS

Volume IB

Professor John Swan

and

Professor Vaughan Black

1987 - 1988

Faculty of Law

University of Toronto

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3. CHOICE OF LAW IN TORTS

The problems of contracts, as we have seen, are characterized by a general agreement on the part of all jurisdictions that the law of contracts has to forward some general social policies. It is a fact that, apart possibly from some consumer transactions, the laws of almost all countries in the world are and must be nearly the same on the rules to be applied to the ordinary commercial contract. This statement does not claim that the rules are both identically expressed and applied in all jurisdictions: it claims only that there must be roughly similar rules for the making of contracts, for their interpretation and construction, for the existence of excuses for non-performance, and for the remedies on breach. It is unimportant that one jurisdiction may put the risk of loss arising under the "postal acceptance rule" on one side rather than the other, or that one jurisdiction may be less, or more willing to excuse a party from further performance on the ground that performance has become more onerous than was expected when the contract was made. Differences over the methods of quantifying losses, while practically important for the parties, are insignificant in terms of theory, and do not invalidate the claim that all jurisdictions must provide some mechanism for giving compensation to the party who has been injured by the other's breach of contract.

In tort, on the other hand, the differences between the rules of different jurisdictions are significant, and they extend to the fundamental purposes of each tort regime in each of the jurisdictions with which we shall be concerned. We shall see obvious problems arising from the need to accommodate in a "fault" based system, rules derived from a system of "no-fault" liability. Similarly we shall see problems arising from the interaction of rules which, from the point of view of one jurisdiction are clear anachronisms, but which are still in full force (in theory at least) in another.

You will remember the attempt by those acting for the injured parties in the Bhopal tragedy to bring that litigation in courts of the United States. That attempt was motivated by two factors: the very wide American rules for obtaining evidence, and the far more generous level of compensation in America than in India. Such procedural differences might exist in a contracts case, but except, perhaps, in a case coming close to one of manufacturer's liability, they are probably unimportant. The tremendous differences in the amount of recovery by those injured in the Bhopal tragedy depending on where the action was brought, would almost certainly not exist in a contracts case. That difference expresses divergent ideas about the measurement of

human suffering and loss in financial terms, and says much about the whole pattern of comparative social relations, the need for economic incentives for development, the underlying insurance effects and the methods used to provide compensation for suffering and loss in India and America.

It will be useful, therefore, to spell out some of the underlying theoretical issues that can arise in a torts claim.

The Criminal Element

It may have been true some centuries ago in England that a tort claim made by a plaintiff had a large criminal element. That is to say, a tort, while being the basis for the plaintiff's obtaining compensation - the essence of a civil claim - from the defendant, may also have necessarily involved some kind of criminal conduct on the part of the defendant. An action in trespass involved an allegation in the plaintiff's pleadings that the defendant had, "vi et armis" and "contra pacem regem", committed an assault on the plaintiff, or had trespassed on his land or wrongfully taken his goods. The "criminal" element in tort claims may survive even today to some extent in the so-called "intentional torts", where punitive damages are allowed. Such claims are now a tiny proportion of modern tort claims.

We see hold-overs from the early notion that tort liability shared some of the features of criminal liability in the traditional English choice of law rule - at least that is one of the more plausible theories to explain its origin. From this point of view, it is not irrelevant that the leading case involved a claim for damages for false imprisonment and assault.

Fault and No-Fault

Most tort claims now arise from negligent conduct, or from those still special cases where some kind of strict or "no-fault" liability is imposed. Vicarious liability, the liability of the "master" for the torts of the "servant" acting within the course and scope of his or her employment, is one of the most important loss distribution mechanisms the law of tort possesses. It is a form of strict liability or "no-fault" liability: the plaintiff has only to show that the employee (to use the modern word) was negligent and that the relation of the employer and employee was such that the former would be vicariously liable ("responsible" is probably the better word). No allegation or finding of fault on the part of the employer is necessary. Difficult problems arise in the "conflict" between fault based regimes, i.e., those where liability depends on proof of "fault", and those with strict liability, or where no proof of fault is required.

Choice of Law in Torts...

A large area with potential for serious conflicts problems is that dealing with compensation for death or injury caused by defectively manufactured goods. Some jurisdictions, Saskatchewan and New Brunswick among them, impose strict liability on manufacturers for products liability, while other provinces and jurisdictions do not. The "Dalkon Shield" and the "Thalidomide" tragedies and other actions against drug companies, asbestos manufacturers and now tobacco manufacturers present huge conflicts problems. The results in such actions may well depend on where the action is brought.

The mystery which we have to face is the continued adherence of both English and Canadian courts to the rule developed in two early cases which have become, in the mysterious processes of the common law, the "leading cases". Not only was there in one of them, as we have mentioned, a claim based on assault and false imprisonment, but in the other there was a direct conflict between a fault based rule and one imposing strict liability. It is hard, as we shall discover, to explain the continued status of these two cases as "leading cases" in an era when we are justified in assuming that one of the most difficult problems in the area of torts now is the need to reconcile fault based liability (negligence) with no-fault based liability in one of its modern forms.

The theoretical problems arise from the need to find a justification for fault based liability and for liability that is either fully "no-fault" as in some modern automobile liability regimes (e.g., Québec) or as in the vicarious liability of a "master" (employer) for the tortious acts of its "servants", or "strict" in the sense of liability for defective products under the Saskatchewan and New Brunswick statutes (and similar statutes in other jurisdictions) that have been mentioned. Added to the problems of finding a justification for any kind of liability is the need to justify the extent of liability imposed. What do we do if, as the Bhopal actions indicated, we find that the amount of damages available in one jurisdiction for a tort is significantly less than that available in another?

These needs to find some kind of satisfactory basis for what we do will force us to consider both moral and economic justifications for tort liability. If we believe that tort liability is based on the need to reflect Aristotelian concepts of corrective justice, we may find that one approach to what we could do appears more easily justifiable than another. Similarly, if we believe that we can identify the "least-cost avoider", and if we believe that that basis provides a justification for what we do,

we may have a method for dealing with some of the conflict problems that arise.

It is clear beyond all doubt that there is an inescapable need to consider carefully the theoretical basis for what we want to do, and to have some idea of how that basis helps us towards a solution of the problem with which we are faced. It is also clear that tort rules are at least as much influenced by social policy as any other area of the law and that they are used to achieve some social objective. It is an important and difficult problem to decide how far a person who is not "subject" (a term that will itself have to be carefully defined) to a particular political or legal regime can justifiably be forced to help forward its policies.

A Summary of the Development of Modern Tort Choice of Law Rules

It is unnecessary to examine at length many of the cases that establish the choice of law rule in torts. The following is offered as a summary of the law as it was before the first case that is excerpted. The cases that follow that case are examples of the development of the rules that have been established.

There are four possible choice of law rules that have been generally accepted as providing the connecting factor for torts cases. These rules are different formulations of the choice of law rule in the same way as there are different formulations of the proper law in contracts cases. These rules are:

(a) The law of the place where the tort was committed. This rule is expressed in latin as the lex loci commissi or as the lex loci delicti commissi. The abbreviation, l.l.d. is used to refer to both. In most cases it is clear where a tort is committed: the automobile accident occurred at Charles St. and Queen's Park. In others, and these are often the conflicts cases, it is unclear where the tort was committed. A car is defective, it was assembled in Oshawa from parts manufactured in Ohio, and gives rise to an accident in Saskatchewan. It is generally held for the purposes of this choice of law rule that a tort is committed in the place where the injury occurs.

(b) The law of the place where the act giving rise to the injury occurred. This law is referred to as the lex loci actus, or l.l.a. It is often assumed that the l.l.a. and the l.l.d. are the same, or simply alternative ways of stating the same rule. They are not, and it is important to be aware of the need that occasionally arises to keep them distinct. A car that is

defective may cause injury in Saskatchewan, but it may have been negligently manufactured in South Korea. The l.l.d is Saskatchewan, but the l.l.a. is South Korea.

(c) The "proper law of the tort". This rule is a suggestion of Dr Morris, the late principal editor of Dicey and Morris. It is based on the argument that the rule in torts should be the same as that in contracts. The suggestion would have the courts doing the same kind of analysis in torts cases that they now do in contracts cases - with what jurisdiction has the tort its closest and most real connection? We shall examine this rule later. Part of the attractiveness of this rule for its proponents is that in Dicey and Morris, as in other Conflicts texts, the headings of "Contract" and "Tort" are often contained in one Part, usually referred as "The Law of Obligations". The combination of contracts and torts in this way is one example of the Civilian influence on Conflicts. A person knowing only the common law tradition would not normally put contracts and torts together. (What we do with the collapse of the distinction between contracts and torts in modern Canadian law is something that you will have to worry about, particularly for assignments and exams.)

(d) The law of the Forum, the law of the place where the action is brought, the lex fori. As we shall see this is the rule that, in spite of some appearance to the contrary, is the generally accepted rule in the Anglo-Canadian tradition.

The almost universally accepted statement of the present law in Canada is the "double-barrelled" rule laid down by Willes, J., in Phillips v. Eyre (1870), L.R. 6 Q.B. 1. The case arose out of the savage repression of a rebellion in Jamaica. The defendant was the Governor at the time, and the plaintiff had been imprisoned by the forces used by Eyre to suppress the rebellion. The last Act of the colonial legislature of the island had been to pass an Act of Indemnity for the Governor, absolving him of all liability for what he had done in putting down the rebellion. After the Act had been passed, the Governor dissolved the Legislature. The plaintiff brought his action in England (where it was a cause célèbre) claiming damages against Eyre[1]. At issue

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[1] The story of the rebellion and of the Governor, Edward John Eyre (1815-1901), is fascinating. Eyre was an early explorer of Australia, giving his name to Lake Eyre and other landmarks. He

in the case was the effect of the Act of Indemnity on the claim brought by the plaintiff. In dismissing the action, Willes, J. said: (pp. 28-29)

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. ... Secondly, the act must not have been justifiable by the law of the place where it was done."

Before we consider the contribution of this statement to the decision in the case, we must notice some things about the statement itself. The first part of the rule is said to require actionability by the lex fori - the law of the court trying the case. The second part is said to require "non-justifiability"[2] by the lex loci actus - NOT the l.l.c. - the law of the place where the act giving rise to the claim occurred.

Few judicial statements have been subjected to so much critical and judicial analysis as this statement by Willes, J. (see Dicey and Morris, 10th Ed., 1980, pp. 927-982, where the cases are collected). Almost always the words have been regarded by both judges and academics as possessing nearly statutory force. This force amounts sometimes to that possessed by some kind of holy writ. The words have been defined, explained, disapproved, applauded and condemned, but nearly always adopted as stating the common law choice of law rule for torts.

It is worth noting that the so-called statement of the "rule" in Phillips v. Eyre is not even the ratio of the case. In the paragraph in his judgment immediately preceding the "rule", Willes, J. said: (p. 28)

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was known as a friend of the Aborigines and he wrote extensively on Australian geography. After a term as lieutenant governor of New Zealand, he became governor of Jamaica in 1864. The rebellion he suppressed broke out in 1865. Eyre was recalled in 1866, in part in response to the efforts of those who later supported Phillips. The action brought by Phillips attracted great interest in England. Phillips was supported by people like J.S. Mill, Herbert Spencer and Goldwyn Smith, while Eyre was supported by Tennyson, Thomas Carlisle, John Ruskin and Charles Kingsley. One consequence of the affair was that it contributed to the fall of the government of Lord John Russell in 1866.

[2] This word is awkward but, as we shall see, attempts to find alternative ways of phrasing Willes' statement have, more often than not, created more problems than they have solved.

> "A right of action, whether it arises from contract governed by the law of the place, or wrong, is equally the creature of the law of the place and subordinate thereto. ... And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law."

This statement subtracts from the force of "actionability" in the first rule and adds something to "non-justifiability" in the context of the second. The significance of this statement has never been adequately explored in judgments which have purported to follow Phillips v. Eyre.

The decision to dismiss the action brought by the plaintiff could be based on either statement. The latter quotation is sufficient to justify the decision. It is important to notice that the word "justifiable" in the former quotation is particularly appropriate in referring to the defence based on the Act of Indemnity. The effect of that Act was to "justify" (and to protect from legal consequences) the acts of Governor Eyre in suppressing the rebellion. Later cases that have applied Willes' statement have seldom made any attempt to take account of this fact.

The "First Rule" in Phillips v. Eyre

It is sometimes argued (e.g. by Spence in "Conflict of Laws in Automobile Negligence Cases" (1949), 27 Can. Bar Rev. 661 and Yntema in "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721) that the first rule is a jurisdictional rule, that is, a rule limiting the court's jurisdiction to hear a case unless the tort be actionable in England (or Ontario). This suggestion has been made by several writers over the years, but is not now generally accepted. The main strategy behind the attempt to argue that the rule in Phillips v. Eyre is a jurisdictional test rather than a choice of law test is that if it is the former (and if the plaintiff's cause of action is lucky enough to clear both hurdles of the test) the court is then free to select another, more sensible choice of law rule. It is difficult to see why peculiar and special tests should be introduced in torts cases which are not present in other conflicts cases and why this rule should, so to speak, be sprung on us by Willes, J., without any prior warning.

The result of the cases and the consensus of the writers at the moment indicate that the first rule is a choice of law rule, a rule requiring the plaintiff to show that he is entitled to a remedy by the law of the place where the action is brought. But

even this conclusion is not free from difficulty. There have been suggestions made that the rule is nothing more than a rule of public policy (Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953), 39 Tr. Grot. Soc. 39). In this view, the first rule would only exclude those foreign rules that are obnoxious to English (or Canadian) notions of fairness, justice or morality, so that to apply the foreign rule would be an abuse of the process of the court.

The case cited by Willes J. in support of the first rule stated in the first quotation above is The Halley (1868), L.R. 2 P.C. 193. This case was decided two years before Phillips v. Eyre by the Privy Council on appeal from the High Court of Admiralty. That action arose out of a maritime collision in Belgian waters. At the time of the collision, the "Halley", the defendant "ship" was under the control of a "compulsory" pilot, a pilot that the master of the ship was compelled by Belgian law to have on board, and whose negligence caused the collision. Belgian law made the owners of the ship liable for the negligence of the pilot. At the date of the trial and appeal, English law did not make the owners of a ship liable for the negligence of a compulsory pilot. (English law was changed soon after the decision in The Halley.) The issue before the Privy Council was whether this Belgian rule for loss distribution should be enforced or not.

The language of Selwyn, L.J., giving the opinion of the board, strongly supports the argument that the court regarded the application of the foreign rule as offensive to English notions of justice. Selwyn, L.J. said: (pp. 202, 204)

> [T]he question is, whether an English Court of Justice is bound to apply and enforce [the foreign] law in a case where, according to its own principles, no wrong has been committed by the Defendants, and no right of action against them exists.... [I]t is in their Lordships' opinion, alike contrary to principle and to authority to hold that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The argument that the first rule is restricted to those cases where the application of the foreign law could be said to offend "public policy"[3] or the notions of justice of the court

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[3] The phrase "public policy" must be used with care. Its use in a case like The Halley refers to those claims that are regarded by a court as offensive. A court has an inherent power

before which the action is brought cannot be accepted as the law now. It is generally accepted that the scope of the first rule is that the plaintiff must be able to show that it would have a good cause of action even if there were no foreign facts involved at all.

It is impossible to over-emphasize the importance of the statement that has just been made. In essence, the choice of law rule in torts is that the law of the forum (the lex fori or l.f.) applies to determine the validity of any tort claim. As a choice of law rule, this rule is radically different from the rule applied in contracts. The only scope for the foreign law is to offer the defendant an additional defence under the requirement that the act not be "justifiable by the law of the place where it was done". A situation where the foreign law gives a cause of action that the l.f. does not recognize, will not give the plaintiff any chance of using the foreign law to extend the rights given to plaintiffs by the lex fori. The foreign law operates only to give the defendant an additional defence. Determining the extent of that defence is one of the important aspects of the cases that follow.

(See also Hancock, "Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited" (1968), 18 U.T.L.J. 331. Hancock, formerly a law teacher at Dalhousie Law School and then at Stanford is one of the largely forgotten academics who did much to help develop the conflict of laws. His works have been recently collected and re-published as Hancock, Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles. (New York: William S. Hein & Co. 1984).)

There have been comparatively few cases on the first rule but the Supreme Court of Canada has had to deal with it once, as has the High Court of Australia. The case in the Supreme Court of Canada involved vicarious liability. This is a particularly

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to refuse to hear a case in which the plaintiff is making a claim that offends the court's sense of decency or propriety. A court would not, for example, hear a claim for the promised payment of a gangland "contract", any more that it would allow a person to sue for a bribe or any other illegal payment. In this sense the phrase denotes the limits of the courts tolerance for bad behaviour on the part of the plaintiff. The phrase is sometimes used more broadly to connote the general social policy of some legislation or of a common law rule. It is useful if we can confine the use of the phrase, "public policy", to the former situation and find more precise descriptions for the latter connotation.

interesting problem for it is, of course, liability without fault and is to some extent technical in that the scope of vicarious liability is extended by statutes like The Highway Traffic Act. The case, O'Connor v. Wray; (reproduced, infra,) arose out of the death of one pedestrian and the injury to another on the highway in Ontario. The defendant was the owner of the car. He lived in Québec and there the car had been lent to his employee for a trip (not on business) by the latter into Ontario. Action was brought in Québec. The plaintiffs sought to rely on the provisions of The Highway Traffic Act of Ontario (now, R.S.O. 1980, c. 198, s. 166) which imposed liability on the owner for the negligent acts of anyone driving with his consent. There were no such provision under the law of Québec. The Supreme Court, on appeal from the Québec courts, refused to hold the defendant liable, on the ground that there was no liability by Québec law (assuming that all the facts had occurred in Québec).

It must, we believe, be inferred from this judgment (which quoted and relied on Phillips v. Eyre) that the imposition on the plaintiffs of the requirement that they satisfy the Québec rules was not a jurisdictional restriction. Similarly, such a requirement cannot be explained as being one of public policy. For if this phrase means something so abhorrent that the courts will not tolerate it, it is contrary to all the premises on which a federation is founded and on which the Supreme Court operates for the laws of one province to be so regarded by the courts of another. (How could the Supreme Court of Canada apply in a case from Ontario a rule that it had earlier said was abhorrent, even though that conclusion was reached in a case from Québec?) We are therefore left with the result that the plaintiff can only succeed if he can show that, had all the facts occurred in Québec, he would have had a good cause of action.

The Australian case where the first rule was applied is Anderson v.Eric Anderson Radio and T.V. Pty. Ltd. (1965), 114 C.L.R. 20 (H.C.A.). (The similarity in names is purely coincidental: the parties had no connection with each other.) This case involved the particularly nasty and difficult problem of contributory negligence. The plaintiff had been injured in a traffic accident by a servant of the defendant company. He sued for damages in New South Wales. The accident had occurred in the Australian Capital Territory which had apportionment legislation while New South Wales did not. The latter jurisdiction had retained the old common law rule. (You will remember that such legislation permits the court or jury to reduce the recovery of the plaintiff in accordance with the respective degrees of fault of the plaintiff and defendant: it abolishes the absolute defence of contributory negligence.) The trial judge had directed the jury that they might apportion the fault. They did so: 90% to the defendant, 10% to the plaintiff. The plaintiff was therefore awarded 90% of his damages. On appeal, the High

Court purported to follow Phillips v. Eyre and held that, since the defendant had an absolute defence by the lex fori, the plaintiff had no cause of action and the defendant escaped liability.

The only possible conclusion we can draw from these cases is that the first rule in Phillips v. Eyre requires the plaintiff to prove that he has a cause of action under the lex fori no matter where the tort giving rise to the claim occurred.

Other Canadian courts have followed this formulation of the rule. Lieff, J., in Gagnon v. Lecavalier, [1967] 2 O.R. 197 (H.C.) applied the rule to dismiss an action brought in Ontario by a gratuitous passenger who had been injured in an automobile accident that occurred in Québec. In 1963, when the accident happened, gratuitous passengers could not sue the driver (or owner) of the car in which they were riding: Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(2). (This section has now been repealed.) We do not know enough facts about this case to know where the parties lived, but we can presume that the defendant, at least, lived in Ontario as he was sued there.

In no other area of conflicts does a plaintiff have to meet so severe a test as that, no matter where the act giving rise to the claim for damages occurs, he must prove that he could successfully sue on it in the place where the action is brought. In an action on a foreign contract, for example, the mere fact that the contract does not satisfy the requirements of Ontario law does not render it unenforceable in Ontario. Similarly a foreign marriage, even though not in compliance with the Marriage Act of Ontario or with the common law, will normally be recognized as valid in Ontario.

The "Second Rule" in Phillips v. Eyre

The second rule in Phillips v. Eyre has caused far more difficulty for the courts than the first one. there have been more cases and far more confusion. There are three principal ways in which the second rule has caused difficulty. The first is when the act does not give rise to any civil liability but, for example, only criminal liability in the foreign country. The second is when the foreign law provides a defence (e.g., contributory negligence). The third is over the measure of damages.

The classic case on the first aspect is the curious case of Machado v. Fontes, [1897] 2 Q.B. 231 (C.A.). The plaintiff alleged that he had been defamed in Brazil. The defendant sought leave to amend his pleadings to add the allegation that, under

Brazilian law, there was no civil cause of action for what the defendant had done. The only remedy was a criminal charge. The judge in chambers had allowed the application: the Court of Appeal allowed the appeal, holding that the allegation, even if true was irrelevant. Its proof would have no bearing on the outcome of the case. The Court of Appeal held that for an act to be "justifiable" it was not sufficient that no civil liability attached to it and that an action could be brought in England for an act which had only criminal consequences where it was done. This case has been more reviled than almost any other we know of, and may, finally, have been put to rest by the House of Lords (See Chaplin v. Boys, infra.). It has, however, been applied by the Supreme Court of Canada, (McLean v. Pettigrew, [1945] S.C.R. 62; [1945] 2 D.L.R. 65) infra.) and may yet not be quite dead.

It is probably analytically useful to keep the first two aspects (i.e., the question of the existence of a cause of action or a defence to a cause of action) of the second rule separate, but in practice the courts have not maintained the distinction. The Supreme Court of Canada when it referred to Machado v. Fontes in the case of McLean v. Pettigrew did so when the question was as to the effect of Ontario's notorious gratuitous passenger provision. The plaintiff in that case, a gratuitous passenger in the defendant's car, had been injured in an accident in Ontario. The journey had begun in Québec and all the parties lived there. The plaintiff sued in Québec and was awarded damages by the Supreme Court. The defendant had, in fact, been charged in Ontario with driving without "due care and attention" but he had been acquitted by the magistrate. The Supreme Court regarded this as irrelevant and found that the defendant had driven without due care and attention and held that such conduct was not "justifiable" and so the plaintiff's action could be maintained.

The third aspect of the second rule has been considered by the House of Lords in what is now the leading case on torts in the conflict of laws. This case is reproduced immediately following this note. The result of the cases that have so far been discussed is to emphasize the importance of the first rule in Phillips v. Eyre and to establish its applicability in all cases coming before Canadian, English and Australian courts. The second rule has developed a gloss in that, while an act giving rise to civil liability, at least, in the foreign jurisdiction, will be actionable, defences available under the foreign law or more limited rights of recovery will normally be irrelevant. It is probable, as a result of some harsh words said about Machado v. Fontes in Chaplin v. Boys, that the former case is not good law on its narrow facts and that criminality alone may not be sufficient.

Questions and Notes

1. The judgments in Chaplin v. Boys make frequent references to American cases and authors. We will spend much of our time in the second part of this volume in exploring these views. At this point, these views should be largely ignored by you. They indicate that there are other possible points of view to adopt in conflicts cases. The members of the House of Lords do not accept these views and we shall return to some of the criticisms that they make of them. You should view the case simply as part of the development of the law stemming directly from Phillips v. Eyre, and as being largely uninfluenced by transatlantic ideas.

2. The traditional Phillips v. Eyre rule is highly "forum centered". This means that the rules of the place where the action is brought are, in effect, almost entirely determinative of the result. Had Chaplin v. Boys been litigated in Malta, for example, it would not even have been seen as a conflicts case for, if the Maltese court were to apply Phillips v. Eyre, both parts of the rule would point to the application of Maltese laws and the English facts emphasized by the House of Lords would have been irrelevant. This potential difference in the results is sometimes regarded as a "bad thing" for it can lead to "forum-shopping": the selection of a favourable (or likely more favourable) forum by the plaintiff. One response to the problem of forum-shopping has been to suggest that the preferable rule should be "double-actionability". This proposal does not reduce the significance of the law of the forum, but it does increase the significance of the place where the act giving rise to the claim occurred. In this way it is believed that the goal of conflicts analysis - uniform results in similar cases regardless of wherever the action may be brought - can be achieved. The House of Lords in Chaplin v. Boys went some distance along the "double actionability" road but clearly not far enough to ensure that the result in an English court would be the same as the result in a Maltese court.

3. If the House of Lords does not regard the goal of uniformity so highly as to require the plaintiff to prove that by Maltese law he would get what he is claiming, what goal does underlie the judgments? A possible clue to this goal might be found in the following case. Notice that Lord Guest (a Scottish judge) expressly approved of it in Chaplin v. Boys.

Notes and Questions:

1. This was a seven judge court in Scotland. Only two judgments are reproduced above. The narrow issue before the court was whether the pursuer had to show that she was entitled to any remedy under English law or not. The decision of the court was that she had to show that her cause of action was maintainable in England as well as in Scotland. Lord Keith dissented on the question of the application of the limitation period under Lord Campbell's Act - the English equivalent of the Fatal Accidents Act - and on the question whether the pursuer had to be able to show that she could sue as executrix in Scotland. The effect of the decision is to require "actionability" by both laws - the lex fori and the law of the place where the wrong was done. In this case the l.l.a. and the l.l.c. coincide.

2. What reason does the Lord Justice-Clerk give for his decision?

3. The "double actionability" rule does not work very well here, does it? If it doesn't, what is wrong? Is it that one should not seek uniformity? If you think a Canadian court could not do anything as silly as the Court of Sessions did in M'Elroy v. M'Allister, see Simonson v. Canadian Northern Rly. Co. (1914) 17 D.L.R. 516 (Man. C.A.).

4. The next cases are Canadian ones on the same issue. Consider how well the judgments either encourage or discourage forum-shopping.

Notes:

1. Moffatt Hancock wrote a two-sentence case comment on McLean v. Pettigrew in (1945) 23 Can. Bar Rev. 348. He said:

> Students of conflict of laws will no doubt be interested to note that the decision of the English Court of Appeal in Machado v. Fontes, disapproved by judges in Scotland, Victoria, Saskatchewan and Québec, and criticized by Beale, Cheshire, Goodrich, Pollock, Wharton, Keith, Minor and Robertson has been followed by the Supreme Court of Canada without any discussion of the problem involved. This conclusion of the Court was supported by drawing a quite unnecessary implication from a statement made by Chief Justice Duff in a previous case and by a quotation from Dicey on Conflict of Laws.

2. The special position of the Supreme Court of Canada in conflicts cases has never been fully explored. Consider the problem McLean v. Pettigrew in the same way as the court in Ross v. McMullen (supra, p. 94) dealt with Alberta law. Seen in this way, the only issue before the Supreme Court is whether the Ontario guest passenger legislation applies to prevent this plaintiff from suing this defendant. Ontario law is, before the Supreme Court, not a fact as "found" by the trial judge, but a matter of law, which the Supreme Court can authoritatively interpret. (Logan v. Lee (1907), 39 S.C.R. 311, following the decision of the House of Lords in Cooper v. Cooper (1883), 13 App. Cas. 88.) The Supreme Court could determine, as a matter of law for both the Ontario and Québec courts (and for any other court for that matter) the scope of the Ontario legislation. As we shall see, this approach does not remove all problems but, on the facts of McLean v. Pettigrew, it might have permitted a solution based on an interpretation of the Ontario legislation that excluded its application to Québec defendants. Such a solution would obviously exclude any possibility of forum-shopping.

3. As the law now stands, it is, under Phillips v. Eyre, theoretically possible for an Ontario court to hold that, regardless of any foreign facts, the Ontario legislation (in the terms in which it was drafted in 1945) bars all actions in Ontario. This result vividly illustrates the extraordinary difference between the tort rules and the contract rules.

4. Courts have never accepted the full consequences of Phillips v. Eyre when to do so would very seriously undermine important values. This fact has been particularly well demonstrated in a couple of early decision of the Privy Council on appeal from Canadian courts, though these cases tend not to be referred to often by Canadian judges today.

5. In Walpole v. Canadian Northern Railway, [1923] A.C. 113, 70 D.L.R. 201 (P.C.), the plaintiff's husband had been killed in British Columbia by the negligence of his employer, the defendant. British Columbia had workers' compensation legislation which prohibited any action by the injured worker or his dependents. The plaintiff sued in Saskatchewan where there was no such restriction. The Privy Council dismissed the claim on the grounds that the husband's contract of employment incorporated the provisions of the Workmen's Compensation Act, and that, applying Phillips v. Eyre, the act of the defendant being neither actionable nor punishable in British Columbia, could not be anything but "justifiable". A broad definition of "non-justifiability" would clearly support the plaintiff's claim. What, after all, could be more explicit than the provisions of the Ontario act so easily circumvented in McLean v. Pettigrew?

6. McMillan v. Canadian Northern Railway, [1923] A.C. 120, 70 D.L.R. 229 (P.C.) was again an action by an injured worker against his employer. The worker had been injured in Ontario (where no cause of action lay by virtue of the Workmen's Compensation Act), and he also sued his employer in Saskatchewan. The only difference between the Acts of Ontario and British Columbia lay in the fact that in the former province, a claim for compensation under the Act was to be made against the employer, while in the latter province the claim lay against the Board. The Privy Council in this case adopted the reasoning of the Saskatchewan Court of Appeal which had relied on the "fellow servant rule" to hold that nothing the employer did was not "justifiable" in Ontario. This case is equally hard to reconcile with McLean v. Pettigrew.

7. How do any of these cases fit with Chaplin v. Boys?

8. See also: Canadian Pacific Railway Co. v. Parent, [1917] A.C. 195 (P.C.). A more recent example is Sayers v. International Drilling Co. N.V., [1971] 1 W.L.R. 1176, [1971] 3 All E.R. 163 (C.A.)

9. The next case is an illustration of the courts' determination of impose liability in the face of another foreign rule which, at first glance, might cause a court difficulty under the Phillips v. Eyre rule in so doing. The judge mentions Chaplin v. Boys but declines to follow it. Would it have made any difference if he had?

The judge also makes reference to a test that looks like the "proper law" test in contracts. Does it, or should it matter that the contracts rule is based on an agreement, a consensual arrangement, where it cannot be a matter of pure chance that the

parties come, for example from the same jurisdiction? The ability of the judge to see the tort here as only involving British Columbia, is the result of the chance that the parties involved all came from British Columbia. Even in Washington, that chance can only be much less than 1.0.

Notes:

1. Notice how the decision of the Supreme Court in O'Connor v. Wray could be supported simply on the basis that the Ontario legislation did not apply. That is, the court could simply have decided that, in the circumstances of this case, it was not the purpose of the Ontario statute to apply to owners of vehicles who were Quebec residents. This decision was, after all, a decision of the Supreme Court of Canada.

2. The more important aspect of the case appears if we assume that, disregarding for the moment the foreign facts, the Ontario legislation would operate to make the defendant owner liable. The current provisions are: Highway Traffic Act, R.S.O. 1980, c. 198, s. 166(1)

> The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.

3. The issue then becomes one of considering what Newcombe J. meant, or should be taken to mean, when he said that he was "not satisfied that the defendant ever became subject to the Highway Traffic Act of Ontario". It is this aspect of the case that we will focus on later. The case is, from this point of view, a paradigm or archetype of a very important class of cases. The special feature of the case is that, as a case of vicarious liability, it presents the classic problem of determining which of two innocent people shall suffer for the misdeeds of a third. This problem is difficult enough when the facts are not geographically complex: it becomes very much more difficult when there are geographically complex facts.

4. Consider the position of the Supreme Court if the argument that the first rule in Phillips v. Eyre is a rule reflecting only the public policy of the forum, i.e. that the foreign law is so offensive that the court will not give effect to it. Is such a response to the law of another province permissible in a court of one province? Is such a response permissible in proceedings before the Supreme Court?

5. The following case reverses the fact-law situation, that is, where there is no liability by the foreign law.

Notes and Questions:

1. The Québec no fault scheme has caused problems in other cases. See:

Guerin v. Proulx (1982), 37 O.R. (2d) 558.

Perron v. Parisé (1983), 44 N.B.R. (2d) 409 (N.B.Q.B., T.D.) (Deschênes, J.).

Duncan v. Mayhew (1983), 44 O.R. (2d) 65 (H.C.).

Lewis v. Leigh (and two other actions) (1986), 54 O.R. (2d) 324, 26 D.L.R. (4th) 442, (C.A.)

Ang v.Trach (1986), 57 O.R. (2d) 300, 33 D.L.R. (4th) 90 (H.C.) (Henry, J.)

We shall explore these last two cases in more detail later. They do not substantially bear on the issues in Going v. Reid Bros. Ltd.

2. The actual problem that arose in Going has now been altered by the fact that an agreement between insurers licensed in Ontario and the Régie would make compensation from the Régie available to Ontario motorists injured in Québec. Similarly there are provisions dealing with the problem of Québec motorists driving in Ontario. The agreement does not deal with the right of a plaintiff, injured in Québec, to sue in Ontario and recover common law damages even against a Québec defendant. Alberta and Quebec have a similar agreement.

3. The Province of New Brunswick hit upon a unique and most unfriendly way of responding to the problems posed by Québec's no fault scheme. Since is was possible that New Brunswick residents injured in Québec might not be able to get full recovery against 'negligent' Québecois (due to Quebec's statute barring such actions in that province and the difficulty in getting an enforceable judgment from the New Brunswick courts), the New Brunswick legislature enacted a "revenge statute" blocking any Québecois who might be injured in New Brunswick auto accidents from obtaining full recovery. It did this by adding to its Motor Vehicle Act, R.S.N.B. 1973, c. M-17 the following provision:

> 266(2) . . . no person shall have a greater right of recovery resulting from the negligent operation of a motor vehicle or farm tractor in this Province, than that person would have in the jurisdiction in which he ordinarily resides, and in no event any greater right of recovery, than

a person resident in this Province would have in such other jurisdiction. (S.N.B. 1978, c. 39, s. 17)

4. The effect of this legislation would be to give Québec residents injured in New Brunswick the worst of both worlds in a New Brunswick court. They would have to prove the defendant was negligent but would be limited to damages calculated in accordance with Quebec's no fault system.

5. Whom do you think has been tougher on Quebec motorists, the New Brunswick Legislature or the Ontario courts?

6. There is evidence in several of these cases of alternative methods for solving conflicts problems. We shall examine many of these later in these materials. Thus, Rafferty, "Case Comment: Going v. Reid Bros. Motor Sales Ltd." (1982), 19 C.C.L.T. 247, suggests that the court should have used the idea of "the proper law of the tort". The note following outlines this idea. The "proper law of the tort" has received some support from the body that is now the Uniform Law Conference of Canada. The following proposal for a Foreign Torts Act was made in 1966 (Proceedings, 1966 p. 58):

> (1) When deciding the rights and liabilities of the parties to an action in tort the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.
>
> (2) When determining whether a particular state has a substantial connection with the occurrence and the parties, the court shall consider the following important contacts:
>
> (a) the place where the injury occurred;
>
> (b) the place where the conduct occurred;
>
> (c) the domicile and place of business of the parties; and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> (3) When deciding which state, among states having any contact within section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that it is proposed to be applied.